

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NEIL D. JACKSON)	
Claimant)	
VS.)	
)	Docket No. 1,015,690
CITY OF TOPEKA)	
Self-Insured Respondent)	

ORDER

Claimant appealed the March 28, 2005, Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on June 29, 2005, in Topeka, Kansas.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. Larry G. Karns of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges he injured and aggravated his right shoulder in a series of mini-traumas from approximately December 2002, when he returned to firefighting duties, through January 2, 2004.

In the March 28, 2005, Award, Judge Benedict denied claimant's request for benefits. The Judge found claimant had earlier experienced similar left shoulder problems, which were not related to claimant's work for respondent. Consequently, the Judge concluded claimant's right shoulder problems did not result from a series of accidents that arose out of and in the course of claimant's employment with respondent.

Claimant contends Judge Benedict erred. Claimant argues the evidence is overwhelming and uncontradicted that claimant's increased activities as a firefighter caused increased right shoulder pain and swelling, which precipitated the right shoulder

surgery. Accordingly, claimant contends he is entitled to receive benefits under the Kansas Workers Compensation Act, including, but not limited to, permanent disability benefits under K.S.A. 44-510d for a 17 percent permanent partial impairment to the right upper extremity at the shoulder level.

Conversely, respondent argues the Judge's findings were well-reasoned and should be upheld. Accordingly, respondent requests the Board to affirm the March 28, 2005, Award.

The issues before the Board on this appeal are:

1. Did claimant's work activities as a firefighter from December 2002 through January 2, 2004, either injure or aggravate his right shoulder?
2. If so, what functional impairment, if any, was caused by those work activities and what functional impairment, if any, preexisted the work injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be reversed to award claimant compensation under the Workers Compensation Act.

The Board finds it is more probably true than not that claimant injured his right shoulder working as a firefighter from December 2002 through January 2, 2004, which precipitated right shoulder surgery. Accordingly, claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

Claimant initially injured his right shoulder in January 1999 when he slipped on ice and landed on that shoulder. Later that month, claimant also had an incident at home in which he injured or aggravated his right shoulder.

Following the January 1999 fall, claimant's right shoulder hurt if he slept on it wrong and it caused him to quit bowling.¹ Moreover, claimant received medical treatment from Dr. Michael T. McCoy, who advised claimant he would probably develop bone spurs in his right shoulder due to his fall and eventually require surgery.²

¹ R.H. Trans. at 14.

² *Id.* at 16.

In 1999, claimant was a fire inspector and arson investigator. But in December 2002, claimant returned to firefighting and began experiencing increased right shoulder symptoms. Claimant's right shoulder gradually became more painful and weaker.³ Due to his increased symptoms, in early December 2003 claimant returned to Dr. McCoy for additional medical treatment. In January 2004, Dr. McCoy operated on claimant's right shoulder and performed a distal clavicle resection to relieve claimant's pain as bone spurs were impinging upon the rotator cuff.⁴ After recovering from surgery, claimant returned to work for respondent and later retired.

But claimant has also experienced left shoulder problems, which claimant attributes to a 1995 car accident. And in October 2002, Dr. McCoy operated on claimant's left shoulder. According to Dr. McCoy, the bilateral shoulder surgeries he performed on claimant were similar as claimant had fraying of both rotator cuffs and bone spurs of both acromions and the AC (acromioclavicular) joints in both shoulders. According to Dr. McCoy, the bone spurs were natural degenerative changes that resulted from any and all of claimant's activities.

On cross-examination, however, Dr. McCoy acknowledged he operated on claimant in January 2004 due to his pain and that the more a joint is used the more it hurts. Nonetheless, the doctor did not believe stressors such as pulling, swinging an ax overhead, climbing ladders, or similar activities would be more detrimental to an arthritic AC joint than simply raising your hand over your head because the shoulder is designed to place stress on the rotator cuff rather than the relatively small AC joint. Consequently, activities that stress the shoulder can produce pain and fraying of the rotator cuff.⁵ And any repetitive use of the shoulder can stress the AC joint.⁶ The doctor testified, in part:

Q. (Mr. Ostrowski) Is the fraying [of the rotator cuff], in and of itself, a cause for pain?

A. (Dr. McCoy) Yes. That is what is called an impingement syndrome, and I probably see quite a few more people with impingement syndrome and pain than I do people with painful AC [acromioclavicular] joints.

Q. And can that pain be increased with activities that put stress on the shoulder?

³ *Id.* at 15, 21.

⁴ McCoy Depo. at 21.

⁵ *Id.* at 29.

⁶ *Id.* at 32.

A. No. The rotator cuff does -- when you're lifting things, the rotator cuff does get the stress and the AC joint doesn't, but the rotator cuff does, yes.

Q. So to rephrase my question to the way it should be phrased intelligently, can activities cause additional pain of the fraying that we're talking about?

A. Right. If they have a rubbing of the rotator cuff, the more force they put on it, yes, that is force related, whereas the AC joint is just motion related, right.⁷

Dr. McCoy initially rated claimant's right shoulder impairment purportedly under the *AMA Guides*⁸ (4th ed.) at five percent. Dr. McCoy explained his rating, as follows:

Well, I just gave it to him because of discomfort and pain. He had full range of motion and didn't have a rotator cuff tear, but he had some fraying of the rotator cuff, and a regular rotator cuff rating is anywhere from 10% to 15% and, so, I took about half of that for the AC joint. That is how I arrived at it.⁹

But Dr. McCoy also estimated claimant had a two or three percent preexisting functional impairment due to ongoing pain.¹⁰ Moreover, Dr. McCoy indicated he did not know about Table 27 of the *AMA Guides* (4th ed.), which purportedly provides a 10 percent upper extremity rating for someone who has undergone a distal clavicle resection.¹¹

Claimant's medical expert, Dr. Peter V. Bieri, examined claimant in July 2004. Claimant advised the doctor that he had initially injured his right shoulder in January 1999 when he slipped and fell. And that after undergoing conservative treatment, he was released to return to work as a fire inspector. Moreover, claimant reported he returned to firefighter duties in December 2002 and he was required to drag hoses, use an ax and perform other heavy activities with his dominant right arm until he subsequently developed pain, loss of range of motion and weakness. Dr. Bieri related claimant's firefighting duties to the impingement that developed in the right shoulder and to the resulting right shoulder surgery.¹²

⁷ *Id.* at 28, 29.

⁸ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

⁹ McCoy Depo. at 9, 10.

¹⁰ *Id.* at 35.

¹¹ *Id.* at 30, 35, 36.

¹² Bieri Depo. at 10, 11.

Dr. Bieri rated claimant as having a 17 percent functional impairment (10 percent for the distal clavicle excision from Table 27 and eight percent for range of motion deficits) to the right upper extremity under the *AMA Guides* (4th ed.).¹³ According to Dr. Bieri, the *AMA Guides* (4th ed.) specifically provides that the percentages dictated by range of motion deficits should be combined with the ratings provided by Table 27. And regarding any preexisting impairment, Dr. Bieri testified Dr. McCoy would probably be in a better position to determine that.

Considering the entire record, the Board concludes it is more probably true than not that claimant injured and aggravated his right shoulder working as a firefighter from December 2002 through January 2, 2004. The physical demands upon claimant's right shoulder performing such activities as pulling heavy fire hoses, using an ax, and climbing ladders caused an increase in claimant's right shoulder symptoms that precipitated the need for right shoulder surgery.

The Board finds claimant now has a 17 percent right upper extremity impairment as measured by the *AMA Guides* (4th ed.), but that he also had a two percent right upper extremity impairment before commencing his firefighter duties in December 2002. Consequently, the Board deducts the two percent for preexisting functional impairment from 17 percent as required by K.S.A. 44-501(c). Accordingly, claimant is entitled to receive permanent disability benefits under the schedules of K.S.A. 44-510d for a 15 percent impairment to the right arm at the shoulder level.

AWARD

WHEREFORE, the Board reverses the March 28, 2005, Award.

Neil D. Jackson is granted compensation from the City of Topeka for a series of mini-traumas and accidents from December 2002 through January 2, 2004, and resulting disability. Mr. Jackson is entitled to receive 5.29 weeks of temporary total disability benefits at \$440 per week, or \$2,327.60, plus 32.96 weeks of permanent partial disability benefits at \$440 per week, or \$14,502.40, for a 15 percent permanent partial disability, making a total award of \$16,830, which is all due and owing less any amounts previously paid.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum upon presentation of proof of utilization.

Claimant is entitled to payment of authorized medical benefits.

¹³ *Id.* at 12, 13.

Future medical benefits may be considered upon proper application to the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Larry G. Karns, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director